No. A901450
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:	
LITTLE SISTERS BOOK AND ART EMPORIUM and B.C. CIVIL LIBERTIES ASSOCIATION and JAMES EATON DEVA and GUY ALLEN BRUCE SMYTHE PLAINTIFFS	REASONS FOR JUDGMENT
AND: MINISTER OF JUSTICE and ATTORNEY GENERAL OF CANADA and MINISTER OF NATIONAL REVENUE DEFENDANTS	OF THE HONOURABLE MR. JUSTICE COLLVER
Counsel for the Plaintiffs:	Joseph J. Arvay, Q.C.,
Counsel for the Defendants:	Mary Humphries,
Counsel for the Intervenor, the Attorney General of Province of British Columbia	Frank A. Falzon, and Angela R. Westmacott
Place and Date of Hearing,	Vancouver, B.C., September 29, 1992

The plaintiffs assail the constitutional validity of provisions of the *Customs Tariff* and the *Customs Act* pursuant to which homosexual publications have been seized, detained, and prohibited from importation into Canada. The Government of Canada, with the intervening support of the Government of British Columbia, seeks an order striking out the plaintiffs' Statement of Claim.

HISTORY OF THE DISPUTE

The corporate plaintiff, Little Sisters Book and Art Emporium ("Little Sisters"), imports and sells books and magazines written by and for homosexual men and women. The plaintiffs, Deva and Smythe, are the principal shareholders of Little Sisters.

The plaintiffs claim that over the past several years Customs inspectors have seized, detained, and in some cases destroyed hundreds of books and magazines which Little Sisters has sought to import into Canada. The *Customs Act*, S.C. 1986, provides a system of prior restraint which empowers federal officers to determine the tariff classification of these publications - with obscenity inevitably being the issue.

Where seizures and detention have resulted, Little Sisters has been required to invoke statutory review procedures. First, there is a request for redetermination by a designated officer - who is at the next level above the original classifier. If that fails, an importer then asks for a further review by the Deputy Minister of National Revenue. There is no resort to the courts unless the importer also fails to make it past the Deputy Minister.

Given the dated nature of many of the imported publications, the review process has proved to be anything but effectual.

THE PROCEEDINGS

The plaintiffs seek declaratory relief, based on two perceived constitutional breaches. The first involves their claim that the process of prior restraint infringes freedom of thought, belief, opinion and expression (as guaranteed in S. 2(b) of the ***Canadian Charter of Rights and Freedoms***), and is not a reasonable limit prescribed by law in a free and democratic society.

Next, the plaintiffs submit that the statutory review provisions have been construed and applied to seized and detained material in a manner that discriminates on the basis of the sexual orientation of the authors and readers, contrary to their right to equality before and under the law as guaranteed in S. 15 of the ***Charter***.

However, under Rule 19(24)(b) and (d) of the ***Rules of Court***, the defendants submit that the plaintiffs' claim is "unnecessary" or "otherwise an abuse of the process". Their attack on the pleadings is founded on the premise that since there is a statutory review process in place, by which the validity and legality of customs seizures is assessed, it is inappropriate to attempt to circumvent that process by a direct challenge to the legislation. They submit that the plaintiffs can only properly base their claim on the merits of a particular seizure which, of course, they have failed to do.

DISCUSSION

Section 114 of the ***Customs Tariff***, S.C. 1987, c. 49 (through Schedule VII) prohibits importation into Canada of of any books, printed paper, drawings, paintings, prints, photographs or representations of any kind that are deemed to be obscene under subsection 163(8) of the ***Criminal Code***. This tariff provision incorporates the ***Criminal Code*** definition of obscenity.

The Supreme Court of Canada recently addressed the question whether, and to what extent, Parliament may legitimately criminalize obscenity. In R. v. Butler, [1992] 1 S.C.R. 452, the court first defined obscenity, then determined that as defined, the *Code* provision is a reasonable limit prescribed by law demonstrably justified in a free and democratic society - its purpose not being moral disapprobation, but avoidance of harm to society.

The defendants emphasize that if, in the context of the above objective, Little Sisters can successfully show that the books and magazines it seeks to import are not obscene, this lawsuit would prove to be premature. In other words, the appropriateness of the tariff classification should properly be made in the course of the statutory appeal process, not in this action.

Citing ***Moore v. B.C.*** (1988), 23 B.C.L.R.(2d) 105 (C.A.), the defendants emphasize two propositions.

First, where statutory procedures exist which are designed to allow for vindication of complaints without recourse to the *Charter*, those procedures must be utilized. In other words, the *Charter* was not intended to supplant existing statutory procedures which may reasonably result in a resolution of issues.

Second, even where *Charter* arguments do properly arise in the assertion of a claim, and where the court has jurisdiction to entertain such arguments, it should decline to do so where there is an equally effective avenue elsewhere for advancing *Charter* arguments. In *Moore*, supra, it was stated:

> The superior courts have discretion to decline jurisdiction where just and appropriate relief can be granted by another tribunal, and will exercise jurisdiction only where there is a need to do so: *Mills v. R.*, [1986] 1 S.C.R. 863 at 869.

The defendants argue that with the exception of two appeals filed over five years ago (respecting eighteen books) the plaintiffs have failed to pursue *Customs Act* review procedures. Furthermore, no appeal has been filed since the Supreme Court of Canada "significantly sharpened (and upheld under the *Charter*) the definition of obscenity in Canada".

That, reply the plaintiffs, misses the point of their suit, which has been brought solely to determine the constitutionality of legislation which authorizes the prior restraint of material on grounds of obscenity - not whether certain material is obscene. To the extent that they hope to prove that certain material is not obscene, the plaintiffs further emphasize that they hope to demonstrate the evils of prior restraint - rather than to simply obtain a ruling that seized and detained books be released.

In effect, the plaintiffs submit that the process of prior restraint, expressly provided for in the impugned legislation, can only be challenged on constitutional grounds. Notwithstanding Little Sisters' consistent requests for redetermination, and its intention to continue the statutory review process if the present constitutional challenge fails, that course does not address the larger problem posed by the system of prior restraint.

As to the notion that the propriety of prior restraint should only be canvassed in the context of "a live dispute", the plaintiffs make two very telling points.

First, they object to having to employ the very appeal procedures which they assert to be both cumbersome and unconstitutional, only to face the prospect of ending up in the same court in which they have commenced this action.

Second, they emphasize that the court will not be asked to decide the constitutionality of the impugned legislation in the abstract, as there will be ample evidence to provide the court with a proper record upon which to found its ruling. In this regard, they intend to adduce evidence that Customs officials have, in the past, seized and detained publications without proper consideration of their merits.

DECISION

I approach the prospect of striking the plaintiffs' pleadings by referring to the frequently cited "plain and obvious" test (stated with reference to the predecessor of Rule 19) found in the reasons of the Honourable Mr. Justice Tysoe, in ***Minnes v. Minnes***, (1962), 39 W.W.R. 112 (B.C.C.A.):

> In my respectful view it is only in plain and obvious cases that recourse should be had to the summary process under O.25, R.4, and the power given by the Rule should be exercised only where the case is absolutely beyond doubt. So long as the statement of claim, as it stands or as it may be amended, discloses some question fit to be tried by a judge or jury, the mere fact that the case is weak or not likely to succeed is no ground for striking it out. If the action involves investigation of serious questions of law or questions of general importance, or if facts are to be known before rights are definitely decided, the Rule ought not to be applied.

The ***Minnes*** test has been applied in many later British Columbia cases, and was recently approved by the Supreme Court of Canada, in ***Hunt v. Carey Canada Inc.***, [1990] 2 S.C.R. 959, where the Honourable Madame Justice Wilson emphasized (at p. 990):

> "Indeed, I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed".

I have made reference to the defendants' reliance upon the decision in ***Moore v. B.C.***, supra, with respect to the plaintiffs' perceived failure to further utilize the impugned statutory review process. But in ***Moore***, it was not the review process itself (under the ***Human Rights Act***) which was under attack.

As to the defendants' concern for the integrity of the judicial process, I think the spectre of abuse is overstated.

I do not view the decision to sue as a simple dismissal or disregard of the statutory procedure chosen by Parliament for the review of questioned classification decisions. Both the efficacy and the constitutional validity of the review process are challenged here. There is, therefore, merit in the plaintiffs' position that they should not be limited to examining and testing that very process only within its questioned confines.

I conclude that the present case more properly lends itself to the kind of examination undertaken in ***B.B.F. v. British Columbia***, [1989] B.C.J. No. 269 (CA009266). There, the plaintiff unions challenged the constitutional validity of many of the provisions of the ***Industrial Relations Act***. The defendant complained that: some of the plaintiffs' claims were not justiciable; it was improper to seek declaratory relief in the absence of a "factual context"; the action was premature because there was an adequate alternative remedy elsewhere.

However, in ***B.B.F. v. British Columbia*** the pleadings were not struck, and in upholding the decision of the chambers judge, the Honourable Mr. Justice Taggart quoted the following passage from his reasons:

> There is no question that the plaintiffs must overcome some formidable legal obstacles to even have their claims heard on their merits. They have chosen a direct approach to this court, presumably due in part to their decision to boycott the proceedings of the Industrial Relations Council. It is they who have made that choice. As a consequence of this motion, they have full and detailed knowledge of the attack which will be made on this form of action. Should their action founder on such procedural arguments at trial, they cannot be heard to complain.

This case, like ***B.B.F. v. British Columbia***, raises important constitutional issues. Given their history of dealings with Customs authorities, I am satisfied that the plaintiffs will be able to adequately prepare for a focussed and realistic inquiry.

I must confess to some difficulty in visualizing an effective alternative to the kind of review process the plaintiffs attack. However, within the framework of an application to strike pleadings that concern is misplaced. What is important here is that the defendants have fallen short of establishing that the plaintiffs' action must fail.

For the above reasons, the defendants' application is dismissed, with Scale 2 costs to the plaintiffs in any event of the cause.

Vancouver, B.C., November 12, 1992